84-331(2)

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No. _____

SUPREME COURT OF THE UNITED STATES

October Term 1983

DOROTHY ENRIGHT, et al.,

Petitioners,

v.

BOARD OF SCHOOL DIRECTORS OF
THE CITY OF MILWAUKEE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 10, 1984

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TABLE OF CONTENTS

	Page
SUPPLEMENTARY STATEMENT OF FACTS - -	1
SUMMARY OF ARGUMENT - - - - - - - - -	1
ARGUMENT - - - - - - - - - - - - - - - -	1
CONCLUSION - - - - - - - - - - - - - - -	7-8

TABLE OF AUTHORITIES

Page

Jackson v. City of Joliet, 715 F.2d 1200 (CA 7 1983) - - - 4

Martinez v. California, 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553 (1980)- - - - - - - - - - - - - - - 2

Monroe v. Pape, 365 U.S. 167 (1961)- 2

Parratt, et al v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) - - - - - - - 3

United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1940)- - - - - - 2

SUPPLEMENTAL STATEMENT OF FACTS

The suspicious individual referred to by the petitioner was never on the school grounds but was, at all times, on the city street and the injury took place a block away from the school premises during the lunch period.

SUMMARY OF ARGUMENT

I. THE FACTS OF THIS CASE DO NOT INVOLVE THE MISUSE OF POWER POSSESSED BY VIRTUE OF STATE LAW AND MADE POSSIBLE ONLY BECAUSE THE WRONGDOER IS CLOTHED WITH THE AUTHORITY OF STATE LAW.

II. THERE IS NO REASON FOR FEDERAL JUDICIAL INTERVENTION IN THIS CASE.

ARGUMENT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING WRIT OF CERTIORARI IN THIS PARTICULAR CASE.

The facts in this case clearly indicate that the boy's death is too remote a consequence of the school secretary's action to hold the respondents responsible under the Federal Civil Rights Law and in addition there is a complete lack of any arbitrary or

irrational action on the part of respondents. Martinez v. California, 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553 (1980)

The facts of this case also indicate there is no misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1940)

In referring to 42 U.S.C., Section 1983, the United States Supreme Court has stated:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the 14th Amendment might be denied by state agencies." Monroe v. Pape, 365 U.S. 167 (1961)

II. 42 U.S.C. SECTION 1983 DOES NOT MAKE EVERY TORT THAT MAY BE COMMITTED UNDER COLOR OF STATE LAW ACTIONABLE IN FEDERAL COURT.

In Parratt, et al - Taylor, 541 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the court states:

> "...To accept respondents' argument that the conduct of the state officials in this case constituted a violation of the 14th Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the 14th Amendment cognizable under Section 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale, any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under Section 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.' Paul v. Davis, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society."

The Circuit Court of Appeals for the 7th Circuit analyzed the problem as follows in Jackson v. City of Joliet, 715 F.2d 1200 (CA 7 1983):

> "But even if the complaints state good claims under general tort principles, it does not follow that they state good claims under Section 1983 just because the defendants are public officers... Section 1983 provides remedy only for violations of federal law... If the plaintiffs have a claim it is under the 14th Amendment's due process clause, which forbids the state to deprive anyone of life, liberty, or property without due process of law. There are two ways in which the complaints might be thought to allege violation of the due process clause. First, it could be argued that the liberties secured by the clause include not only the traditional negative liberties - the right to be left alone, in its various forms - but also certain positive liberties, including the right to receive the elementary protective services that the state routinely provides users of its highways. If so, and a state officer deprives a person of such liberty and death ensues as a proximate result, damages for that death could be recovered under Section 1983.

"The problem with this argument is that the Constitution is a charter of negative rather than positive liberties... The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The 14th Amendment adopted in 1868 at the height of the Laissez-Feire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. Of course, even in the Laissez-Feire era, only anarchists thought the state should not provide the type of protective services at issue in this case. But no one thought federal constitutional guarantees or federal tort remedies necessary to prod the states to provide the services that everyone wanted provided. The concern was that some states might provide those services to all but blacks, and the equal protection clause prevents that kind of discrimination...It is enough to note that, as currently understood, the concept of liability in the 14th Amendment does not include a right to basic services, whether competently provided or otherwise.

"But the plaintiffs have another argument: The 14th Amendment forbids the state to deprive anyone of his life without due process of law; to deprive a person of his life through negligence is the antithesis of due process; therefore, the complaints state a cause of action under Section 1983. This argument would succeed if

the defendants had killed the plaintiffs decedents in circumstances making the killing an intentional tort. But the reason it would succeed is not the syllogism that the plaintiffs press on us; it is history. The due process clause was intended to protect the recently liberated blacks from official oppression, and because it was decided not to write the clause in racial terms, to protect everyone else besides. If due process is not provided, it makes no difference whether the state hangs you or has you shot down in the street by a police officer. Section 1983 has been read to take the command of the due process clause one step further by imposing liability on officers acting under color of, although contrary to, state law. But the concern is with the use of state created power to kill rather than with the state's failing to prevent a death... The plaintiffs' claim are not that the defendants tried to harm the occupants of the car, but that they failed to help them. But the difference between harming and failing to help is just the difference noted earlier between negative liberty - being let alone by the state - and positive liberty - being helped by the state. To accept the plaintiffs' syllogism would be to impose by another route a duty to provide basic services...This case is closer to Bowers v. DeVito...where the state officers did not create but merely failed to avert danger, by negligently

releasing from custody a dangerous lunatic who then killed the plaintiffs decedents; and to Hull v. City of Duncanville..., where the City's negligent failure to enforce speed limit at a railroad crossing resulted in the plaintiffs being seriously injured in the crossing accident...In none of these cases was the defendant's conduct actionable under Section 1983...If the defendants deprived the plaintiff decedents of anything it was of some right to competent rescue services. But, as we have been at pains to stress, there is no such right in the 14th Amendment. Of all the forms of state oppression of the individual, that which consists of trying but failing to assist at accidents must rank very low. It is not 'oppression' at all; it is essentially inaction; and it was remote from the concerns of the framers of the 14th Amendment...What happened in this case is not the kind of thing the framers were not concerned about because they could not foresee but the kind of thing they knew about and surely did not think required a federal tort remedy to prevent. There is no reason for federal judicial intervention in a case like this... The Civil Rights Act of 1871 did not make every tort committed under color of state law actionable in federal court..."

CONCLUSION

There is no reason for federal

judicial intervention in a case like this.

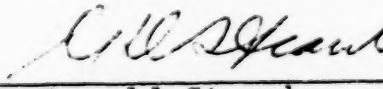
Whatever claims this situation might give rise to under state tort law, it should not give rise to a claim under the United States Constitution.

The State of Wisconsin's Wrongful Death Statute is adequate to satisfy the rights of due process in this particular case.

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Dated at Milwaukee, Wisconsin, this 10th day of September, 1984.

Respectfully Submitted



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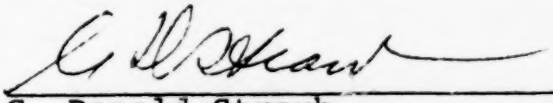
CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of September, 1984, three copies of the Brief in Opposition to the Petition for Writ of Certiorari were mailed, postage prepaid, via First Class Mail, to Robert C. Angermeier, Attorney for Petitioners, at his offices located at 625 North Milwaukee Street, Milwaukee, Wisconsin, 53202. I further certify that all parties

required to be served have been served.



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